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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16338 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANIBEN ALIAS CHHINNI MAFTBHAIMULJIBHAI MACHHI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 16338 of 2003

MR AR GUPTA for Petitioner No. 1

MS P B SHETH AGP for Respondent No. 1-3

RULE SERVED for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 24/03/2004

ORAL JUDGEMENT

The petitioner above named has preferred this

petition under Article 226 of the Constitution of India for appropriate writ, order or direction, for quashing and setting aside an order dated 20/10/03, passed by respondent no.2, for detaining the petitioner u/s.3(2) of the Gujarat Prevention of Anti-Social Activities Act, 1985, (for short, "the said Act") on the ground that the petitioner was involved in seven different offences punishable under the Bombay Prohibition Act, 1949.

2. The petitioner was considered to be a "bootlegger" dealing in bootlegging activities and it was alleged against him that seven offences under the Bombay Prohibition Act, 1949 were registered against the petitioner as follows;

Sr.No.	Police Station	C.R.No.
1.	Dabhoi Prohibition Police Station	932/2002 Dt : 24/06/02
2.	"	1944/2002 Dt : 11/11/02
3.	"	296/2003 Dt : 13/02/03
4.	"	387/2003 Dt : 21/02/03
5.	"	519/2003 Dt : 08/05/03
6.	"	877/2003 Dt : 29/07/03
7.	"	1109/2003 Dt : 21/09/03

3. It was also alleged against the petitioner that three unnamed witnesses had given statements against the petitioner stating that the petitioner was dealing in the said bootlegging activities.

4. On the strength of the aforesaid registered offences, as well as on the strength of the above statements of unnamed witnesses, the detaining authority found that the petitioner was a "bootlegger" and

therefore, the order of detention was passed and the petitioner was arrested and detained.

5. Feeling aggrieved by the said order of his detention, the petitioner has preferred this petition before this Court. It has been contended here that the order impugned in this petition has been passed without due application of mind. It has also been contended that the petitioner could not be treated to be a "dangerous person". That the list of documents supplied shows that the statements of witnesses recorded by the subordinate Police Officer were not verified by the detaining authority. That the reference to one of the witnesses in the grounds for detention supplied to the petitioner shows that the statements made by the witness is different from the statement made in the grounds for detention, which also indicates non-application of mind on the part of the detaining authority. That, therefore, the order of detention cannot be sustained in the eyes of law. The petitioner has, therefore, claimed that the impugned order is illegal and hence, it may be quashed and set aside.

6. On receipt of the petition, Rule was issued and in response to the service of notice of Rule, Ms.P B Sheth learned AGP has appeared on behalf of the respondent State. I have heard the learned advocates for the parties and have perused the papers.

7. The learned advocate for the petitioner has drawn my attention to the list of documents supplied to the petitioner by the detaining authority along with the order of detention and the grounds for detention. The documents at Sr.61 to 66 in the said list at page 28 may be referred to as follows;

Sr.No.	Details	Page No.
61	Statement of unnamed witness no.1 before the Prohibition Inspector	163
62	Statement of unnamed witness no.1 before the District Magistrate	165 to 166
63	Statement of unnamed witness no.2 before the Prohibition Inspector	167
64	Statement of unnamed witness no.2 before the District Magistrate	169 to 170

65 Statement of unnamed witness no.3 before the Prohibition Inspector 171

66 Statement of unnamed witness no.1 before the District Magistrate 172 to 173

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8. On going through the said list, the learned advocate for the petitioner has submitted that though the statements of witnesses no.1 and 2 recorded by the Police Inspector are shown to have been verified by the detaining authority, the list shows that the statement of unnamed witness no.3 has not been verified by the detaining authority.

9. At this stage, the learned AGP has tried to clarify that there is a typographical error in mentioning and referring unnamed witness no.1 at Sr.No.66, which should be the statement of unnamed witness no.3. That, this being a typographical / clerical error, it may be viewed accordingly.

10. Firstly, the said typographical / clerical error has not been explained and secondly, when the statements have been provided and the names of the witnesses who have given the statements have not been disclosed, then, it may become difficult for the petitioner to understand as to whether the statements have been made and verified in accordance with the list supplied or that there is something different from what transpires from the said list.

11. Then the learned advocate for the petitioner has also referred the said statements which are placed at page 163, 165, 167, 168, 171 and 172. It is true that from these pages it transpires that the statements of all the three witnesses have been verified by the detaining authority.

12. However, if we tally the list of documents with these statements, it may become difficult to understand as to whether the statements referred in the list are the statements which have been referred at page 163 onwards. The basic reason is that the names of the witnesses were not supplied and therefore, it may become difficult for the petitioner to understand the correct position on record.

13. it is well settled that the statements of

witnesses are required to be supplied to the detenu in order to allow him to understand as to what stands against him. If the detenu knows about the same, then only he may be able to give an effective representation against his detention. To make an effective representation against his detention is a valuable right conferred on a detenu under Article 22(5) of the Constitution of India. Once there is some ambiguity or scope for misunderstanding, it can be said that the right to make an effective representation has been taken away, and once it is found that the said constitutional right has been taken away, then the further continuation of the detenu cannot be sustained in the eyes of law.

14. At this stage, the learned AGP has drawn my attention to a decision in the case of Paresh Ramanlal Amin V. State of Gujarat & Ors. reported in 2000 (2) GLR 1798. It has been held in the said decision that one ground of detention which is nonexistent as it is vague, would not affect the right to make representation under Article 22(5) of the Constitution of India.

15. Another contention raised by the learned advocate for the petitioner is that the statements made and verified go to suggest some facts which are different from the reference to the statements made in the grounds for detention itself. For this purpose, the learned advocate for the petitioner has read out a statement of unnamed witness no.2 at page 167, wherein the witness has referred an incident which, according to the witness, took place on 25/09/03 at 3 P.M.. The said date and time has been reiterated during the course of verification of the statement of the said witness at page 169. However, if we refer to the grounds for detention, it can be gathered that the reference to the said witness has been made as witness no.2. There, it has been mentioned that the incident took place on 25/03/03 at 3 A.M..

16. The learned advocate for the petitioner has argued here that this is a clear non-application of mind with respect to the material made available to the detaining authority. She has also argued that though the statement and the verification both show that the incident of 25/09/03 had happened at 3 P.M., the detaining authority has mentioned the time as 3 A.M.. Again the learned AGP has argued here that it is a matter of typographical error and therefore, it may be construed accordingly.

17. So far the records are concerned, this clarification cannot be gathered and it has not been

shown from the record that it is a typographical error. The learned AGP has also argued that the reference to the said incident pertains to a fact that the witness had gone for the purchase of goods and that such an event could take place only at 3 P.M. and not at 3 A.M.. If the matter was so simple, then, while applying its mind to the said fact, the detaining authority would have clearly indicated that the said incident took place at 3 P.M. and not at 3 A.M.. While mentioning the time of 3 A.M., it would have struck to the detaining authority that there is something wrong. The witness would not go for the purchase of goods at 3 A.M., and, therefore, it must be 3 P.M.. This ought to have struck to the detaining authority, while showing the grounds for detention and while referring to the statements of unnamed witness no.2.. This again shows that there is some sort of non-application of mind on the part of the detaining authority. Even by the use of some sort of imagination or common sense, this error could have removed before the order was passed. This has not been done and the aforesaid error has been allowed to remain on record, which would further indicate that it is a matter of non application of mind on the part of the detaining authority.

18. In para 3 of the grounds for detention supplied to the detenu and produced on record along with the petition, it is noticed that there is a reference made by the detaining authority to the petitioner showing that the petitioner was a widow and if any male person would prevent her from carrying out her bootlegging activities, then the petitioner would to make defamatory allegations against him. Now, if we go through the aforesaid statements of three unnamed witnesses and their verifications, it is not possible to find out from these statements that those witnesses had so stated in their initial statements before the Police Officer or in their verification statements before the detaining authority.

19. The learned AGP has argued here that this is not a ground for detention. Let us take it that it is not a ground for detention supplied to the detenu by the detaining authority. It is not explained as to from which material these allegations have been made in the grounds for detention. As said above, three unnamed witnesses have neither said so in their statements before the detaining authority nor did they say so before the detaining authority during the course of verification of statements.

20. This would clearly show that this is an

extraneous matter which has been placed on paper in the grounds for detention supplied to the petitioner. So, on the one hand, this is an extraneous matter which has been placed in the grounds for detention by the detaining authority, which is borne out from the records, and on the other hand, the petitioner is deprived from knowing as to from which corner this allegation has been reproduced by the detaining authority in the grounds for detention.

21. It has also been alleged therein that being a women, she was required to provide good culture to the family and instead, by carrying out bootlegging activities, she has ruined the public at large.

22. The learned advocate for the petitioner has also argued that though the petitioner has been branded as a "dangerous person", the records do not show that the petitioner is a "dangerous person". For this purpose, she as also referred to the definition of "dangerous person". As said above, the detaining authority has not considered the petitioner as a "dangerous person" u/s.2(c) of the said Act. The grounds for detention clearly indicate that the petitioner has been treated to be "bootlegger" within the meaning of s.2(b) of the said Act. Therefore, it would not be necessary to consider the said argument.

23. The learned advocate for the petitioner has also relied upon a decision in the case of Piyush Kantilal Mehta V. Commissioner of Police, Ahmedabad City & Anr. reported in AIR 1989 SC 491. There it has been observed that the detenu was alleged to be a prohibition bootlegger and indulging in using force and beating people. That barring some minor incidents alleged against the detenu, it could not be said to create insecurity or panic in general public. Therefore, the detention order was held to be illegal. There the Hon'ble the Supreme Court has referred to the disturbance of public order. In the present case we find, that while passing the order of detention against the petitioner, it has been specifically mentioned that the activity of the petitioner manufacturing liquor of low quality amounted to a danger to public health. This can be gathered from para 3 at page 20. Therefore, in the present case we find that the petitioner's activity is not shown to be restricted to a danger to public order. It has also been alleged that the activity of the petitioner amounted to a threat to public health. In that view of the matter, the above decision may not squarely apply to the facts of the case on hand.

24. The learned advocate for the petitioner has also relied upon a decision in the case of Mustakmiya Jabbarmiya Shaikh V. M. M. Mehta, Commissioner of Police & Ors. reported in (1995) 3 SCC 237. There a reference has been made to section 2(c) of the said Act. It has been observed therein that the provisions of the Act are intended to deal with habitual criminals, dangerous and desperate outlaws who are so hardened and incorrigible that the ordinary provisions of the penal laws and the mortal fear of punishment for crime are not sufficient deterrents for them. Section 3 of the Act is, therefore, intended to deal with such criminals who cannot readily be apprehended to be booked under the ordinary law and who for special reasons, cannot be convicted under the penal laws in respect of the offences alleged to have been committed by them. But this power under the Act to detain a person should be exercised with restraint and great caution. In order to pass an order of detention under the Act against any person the detaining authority must be satisfied that he is a "dangerous person" within the meaning of Section 2(c) of the Act who habitually commits, or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or Chapter XVII of the Penal Code or any of the offences punishable under Chapter V of the Arms Act as according to sub-section (4) of Section 3 of the Act it is such "dangerous person" who for the purpose of Section 3 shall be deemed to be a person "acting in any manner prejudicial to the maintenance of public order" against whom an order of detention may lawfully be made.

25. In the present case we find that the petitioner has also been alleged to be person whose activities stage a threat to public health. The allegations are not restricted to the activities amounting to public order only. In that view of the matter, when this decision speaks of public order and when the present case refers to public health, then the decision in question will not apply to the facts of the case on hand.

25.1 In para 9 of the said decision an observation has been made with respect to public order and law and order as follows;

"Para 9. In order to bring the activities of a person within the expression of "acting in any manner prejudicial to the maintenance of public order", the fall out and the extent and reach of the alleged activities must be of such a nature

> that they travel beyond the capacity of the ordinary law to deal with him or to prevent his subversive activities affecting the community at large or a large section of society. It is the degree of disturbance and its impact upon the even tempo of life of the society or the people of a locality which determines whether the disturbance caused by such activity amounts only to a breach of "law and order" or it amounts to breach of "public order". If the activity falls within the category of disturbance of "public order" then it becomes essential to treat such a criminal and deal with him differently than an ordinary criminal under the law as his activities would fall beyond the frontiers of law and order, disturbing the even tempo of life of the community of the specified locality."

Again at the cost of repetition, it has to be observed that whatever pleaded in the order of detention is with regard to public health and not public order.

26. On the whole, therefore, it can be said that the order in question has been passed by the detaining authority without full application of mind, which can be gathered from the observations made hereinabove. On the one hand, the list of documents show something, the statements and verification of unnamed witness speak of something else and the reference to the said statements in the grounds for detention is also different. Moreover, as stated above, extraneous matter has been considered by the detaining authority which is not flown from the material made available to the detaining authority. Therefore, the said extraneous matter regarding defamatory allegations said to have been made by the petitioner is an extraneous matter and not flowing from the record. Once it is found that some extraneous matter has been considered by the detaining authority behind the back of the petitioner, then in that case, it has to be held that the principle of natural justice has not been observed.

27. It is true that u/s.9(2) of the said Act, the detaining authority has a power of privilege to keep the names of witnesses away from the notice and knowledge of the petitioner. However, the provision of s.9(2) of the said Act does not permit the detaining authority to get the contents of the statements away from the detenu and then to consider them behind the back of the petitioner. In that view of the matter, when it is found that some extraneous matters have been considered by the detaining

authority and when the contents thereof have not been provided to the petitioner, there is a clear case of violation of the principle of natural justice. The detaining authority would not be expected to consider something which may not have been conveyed to the petitioner. Therefore, the above observation on factual aspects again shows non-application of mind on the part of the detaining authority. There is also a consequential non observance of principle of natural justice.

28. Therefore, either it is a case of non-application of mind or it is a matter of consideration to extraneous matter or is matter of consideration to the materials not provided to or gathered by the detaining authority. Anyway, consideration to a matter not on record is again a serious infirmity in an order of detention.

29. In above view of the matter, it has to be accepted that this being a case suffering from certain technical vice and also from non-application of mind on the part of the detaining authority, the consequent detention order would stand vitiated and it can not be sustained in the eye of law. In other words, the order of detention has to be held to be illegal and therefore, it is required to be quashed and set aside.

30. For the foregoing reason, this petition is allowed. The impugned order of detention dated 20/10/03, passed by respondent no.2 against the petitioner, is ordered to be quashed and set aside. Detenu, Maniben alias Chhinni Mafatbhai Muljibhai Machhi, is ordered to be set at liberty forthwith, if no longer required in any other case. Rule is made absolute with no order as to costs. Direct service permitted.

(D. P. Buch, J.)

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